Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

GUY and BONNIE L. ADAMS (and others listed as parties), on their own behalf and on behalf of, and as Class Representatives of, all other persons similarly situated,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
and
BURLINGTON NORTHERN INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CAMDEN M. HALL
(Counsel of Record)
FOSTER PEPPER & SHEFELMAN
1111 Third Avenue,
Suite 3400
Seattle, Washington 98101
(206) 447-4400

Attorneys for Petitioners

Washington, D.C. • THIEL PRESS • (202) 328-3298

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I. QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioners' Complaint improperly dismissed under Fed. R. Civ. P. 12(b)(6) and 56 when, as a matter of law,

a. Under *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687 (1872), the Gold Bonds must be paid in gold, and not in any other legal tender, if a Bondholder requests such payment; and

b. Maintenance of Congress' 1933 and 1934 abrogation of contractual gold clauses is no longer constitutional due to post-1974 legislation inconsistent with the abrogation or because there is now no constitutional basis for prohibiting payment of the Gold Bonds in gold or its equivalent?

2. Was Petitioners' Complaint improperly dismissed under Fed. R. Civ. P. 12(b)(6) and 56 when

a. As a matter of fact, Burlington Northern ratified its obligation to pay gold for the Gold Bonds and significantly impaired the collateral for the Gold Bonds, an act not allowed by the Gold Bond indentures, and thereby created a new security required to be paid in gold; and

b. The trial court refused to grant Petitioners' Fed. R. Civ. P. 56(f) motion to conduct discovery about Respondents' corporate activities as they gave rise to substituted or novated contracts?

II. PARTIES

1. The Petitioners ("Bondholders") are 109 individuals and private trusts and the following 13 corporations:

Atwood-Hinzman Inc.
Barnts Medical Specialities, Inc.
Central Life Assurance Company (now known as Amerus Life Insurance Company)
DMN, Inc.
First Colony Life Insurance Company
Manhattan Life Insurance Company
Navy Mutual Aid Association
Ribob Company
Eljim Company
Security Mutual Life Insurance Company of New York
Super Jock 'n Jill, Inc.
Trustmark Life Insurance Company
Woodmen of World Life Insurance Company

Of these corporations, only First Colony Life Insurance and Manhattan Life Insurance Company are publicly traded. Pursuant to Supreme Court Rule 29.1 and to our knowledge, none of the companies is a parent or subsidiary of another public company. To our knowledge, the remaining corporations are neither publicly traded nor related to a publicly traded company.

2. Respondent Burlington Northern, Inc., is a publicly held company that has shares outstanding with the public. It has no parent company. Respondent Burlington Northern Railroad Company is Burlington Northern, Inc.'s wholly owned subsidiary.[1] Other than this, neither Respondent has subsidiaries or affiliates that have shares outstanding with the public.

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[1] Respondents are sometimes collectively called "Burlington Northern" in this Petition.

FULL LIST OF PETITIONERS

GUY and BONNIE L. ADAMS; TIMOTHY ADAMS; CLIFTON ALBRIGHT; JANET ALLOTT; ATWOOD-HINZMAN INC. PROFIT SHARING PLAN; VIVIAN AUDETT; HERB and BETTY BAILEY; BARNTS MEDICAL SPECIALTIES; ANNE BOWERS; TOM BRADLEY; ROBERT BRANDT, JR.; DONALD BROOKHART; BRIAN CATHCART; FRANK CATHCART; CENTRAL LIFE ASSURANCE COMPANY; E. WILLIAM and MARLENE CHADDERTON; KENNETH CHUN; VIVIAN CHAN CHUN; KENNETH COLLARD; KAREN DAVIS; CLIFFORD DAVIDSON; CHARLOTTE DE METRY; WAYNE DEMEESTER; DAPHNE DEMETRY; DMN, INC.; DAVID DRIVER; MARVIN DZIABIS; RAY EIFORD; ELJIM COMPANY; ALBERT EVERETT; BRUCE FEARING; JOYCE FEARING; FIRST COLONY LIFE INSURANCE COMPANY; RONALD FRAME; IGNACIA FUENTES; JANET GRATZER for Candace M. and Melanie A. Waiss; PETER and JANET E. GRATZER; FRANK GREEN; MAURICE HAGEN; BEN HANICH; FRANCIS HARTHORNE; SIEGFRIED HARTMANNS; LEE and ANNE HEINZINGER; M. HEINZINGER; WILLIAM R. and DELTA M. HELBIG, SR.; A. SHERMAN HILL; BRENT JAMES; BRYCE JAMES; CLIFFORD JAMES; LAUREL JAMES; GORDON JONES; RICHARD and MARNAE G. JONES; ALAN KAHN; ROBERT KEENHOLTS; CHARLES and CAROL KELTCH; MARVIN KLEIN; RALPH KLINGSHIRN; RICHARD KNUDSON; KERRIE ELIZABETH KNUTZEN TRUST, Gerald C. Knutzen, Trustee;

[continued]

KNUTZEN GRANDCHILDREN TRUST, Gerald C. Knutzen, Trustee; RAYMOND LOCK; MANHATTAN LIFE INSURANCE COMPANY; BERNARDA MANNING; ALBERT MILLER; MARY LOU MILLER; NAVY MUTUAL AID ASSOCIATION; JOHN NELSON; EUGENE ORRICO; MARK and SUSIE OVERBYE; JIM PARRIOTT; S. PERKINS; JOANN PETERSEN; RUSSEL and JANET PETERSON; JOSEPH PIGNATARO; NEIL PLUMLEY; ROBERT N.H. POOLE; RICHARD RALSTON; RICHARD RAU; RIBOB COMPANY; THEODORE ROBINSON; S & M SAKAMOTO PROFIT SHARING PLAN; WILLIAM SCROUP; HAROLD STACK; ELLIS STANLEY; MICHAEL and DANNA K. STEWART; ROBERT and MERRILY STEWART; SUPER JOCK 'N JILL, INC.; DEAN and SHARON SUZUKI; JAMES and YURI SUZUKI; DMYTRO and ROMAYNE SZWAYKA, JR.: WILLIAM TAFT; JAMES and SANDRA THOMAS; ALBERT and MARY ANN TORRICO; TRUSTMARK LIFE INSURANCE COMPANY; IRENE WALTERS; RICHARD WELSH; NANCY WIGGEN; LOIS WILLIAMS; HERMAN WOODCOCK; WOODMEN OF WORLD LIFE INSURANCE COMPANY; GLENN E. WRIGHT; JOHN ZYBURA,

On their own behalf and on behalf of, and as Class Representatives of, all other persons similarly situated.

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V. OPINIONS BELOW

On November 15, 1993, the Bondholders filed their Complaint alleging that certain pre-1933 obligations of Respondent are now payable to the Bondholders in gold or its equivalent in value. App. C. On April 11, 1994, the U.S. District Court for the Western District of Washington granted Respondents' Fed. R. Civ. P. 12(b) and 56 motions to dismiss the Bondholders' Complaint. The Court also denied the Bondholders' Rule 56(f) motion. A related judgment of dismissal was entered that same day. See App. B.

The Bondholders appealed to the U.S. Court of Appeals for the Ninth Circuit. That court on April 10, 1996, affirmed the dismissal. *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377 (9th Cir. 1996). App. A.

VI. JURISDICTIONAL STATEMENT

A. Basis for Subject Matter Jurisdiction

The district court had original jurisdiction over this action under 28 U.S.C. §1331 because of a federal question arising under U.S. statutes. The court also had original jurisdiction under 28 U.S.C. §1332 because the parties are diverse and because the amount in controversy exceeded $50,000.

B. Basis for Jurisdiction in the U.S. Supreme Court

This Petition was filed within 90 days after the entry of the Court of Appeals' decision, as required by 28 U.S.C. §2101(c) and Supreme Court Rule 13.1.

Under 28 U.S.C. §1254, this Court has jurisdiction over an appeal from a final judgment or order of the Court of Appeals.

VII. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision pertinent to this Petition is U.S. Constitution, Article I, Section 8, Clause 5, relating to Congress' power to regulate the nation's monetary system, and U.S. Constitution Amendment V.

The list of pertinent statutes is at page viii of this Petition and in the Table of Contents to App. E.

VIII. STATEMENT OF THE CASE

A. Case Overview and Facts[2]

The Bondholders have sued to enforce "gold clauses" in Respondents' 100- and 150-year maturity railroad bonds that require payment of principal and interest in gold or its equivalent.

Although some courts have considered other gold clauses and gold-clause questions, this case presents a number of issues of first impression. For example:

- What is the effect on Burlington Northern's gold payment duties under Gold Bonds, issued before 1933, in view of recent statutes that now make gold "legal tender" and thus remove any gold payment impediment caused by a 1933 Depression-era congressional resolution?
- What is the effect on Burlington Northern's Gold Bond obligations resulting from its lawsuit settlement and corporate restructuring activities?

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[2]The basic facts are set out in the Circuit Court's opinion, App. A. The Bondholders consist of persons and entities who purchased the Gold Bonds both before and after 1933.

Burlington Northern refuses to pay interest and principal on the Gold Bonds in gold or its equivalent. This refusal is based upon Burlington Northerns' interpretation of congressional enactments in 1933 and 1934 that declared gold no longer to be legal tender for the payment of gold-clause contracts.

Since 1985, gold is again legal tender. Gold coins are now issued by the United States. Payment in gold is no longer against public policy. The Gold Bonds should now be paid in gold or its equivalent.

In addition, recent corporate activities by Burlington Northern, including the settlement of a lawsuit, have created new securities of the Gold Bonds.

B. Historical Background

After the Civil War, gold clauses were routinely inserted into long-dated bonds to protect creditors against inflation and debtors against deflation. These bonds often had maturity dates of 100 years and longer.[3]

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[3] *See generally Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 257 (1939). Before 1933, approximately 55 percent of all long-term debt obligations contained gold clauses. Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 Chi. L. Rev. 504, 523 (1983).

Inflation has seen, for example, the salaries of members of Congress rise from $5,000 in 1897 to $7,500 in 1921 and from $10,000 in 1933 to $133,600 in 1994. *The World Almanac and Encyclopedia* 409, 412 (1897); *The World Almanac and Encyclopedia* 737, 740 (1921); Robert Hunt Lyman, *The World Almanac and Book of Facts for 1933* 183, 184 (1933); *The World Almanac and Book of Facts* 618, 619 (1994). Salaries of Associate Justices of the Supreme Court have increased from $10,000 in 1897, $14,500 in 1921 and $20,000 in 1933 to $164,100 in 1994. Federal appeals court judges' salaries have increased from $6,000 in 1897, $8,500 in 1921 and $12,500 in 1933 to $141,700 in 1994. *The World Almanac and Encyclopedia* 390 (1897); *The World Almanac and Encyclopedia* 614 (1921); *Message of the*

[footnote continued]

Most gold bonds were issued in the late 19th and early 20th centuries to construct railroads and utilities, which were then very speculative enterprises. Investors bought these gold bonds because they were fully secured by enormous land grants issued by Congress.[4] These vast land grants were rich in timber, coal, and other resources. The gold clause and land grants together offered investors the requisite confidence and asset base necessary to raise the capital required to construct the nation's railroads. Bondholders accepted a low interest rate in exchange for a guaranteed return of purchasing power as defined in terms of gold.

The Gold Bonds were intended to be passed from one generation to the next: their secured indentures explicitly stated that their interest and principal were to be payable in gold to the holder or to his heirs and assigns.

C. Gold Legislation and the Gold Bonds

1. The 1933 Resolution Prohibited Payment of Gold Bonds Except With Legal Tender

In 1933, Congress passed a Joint Resolution (the Abrogation Act) declaring gold clauses "against public policy" and providing that any obligation containing a gold clause "shall be discharged upon payment, dollar for dollar, in any coin or currency which *at the time of payment is*

President of the United States Transmitting His Budget for the Service of the Fiscal Year Ending June 30, 1933 390 (1931); *The World Almanac and Book of Facts* 180 (1933); *The World Almanac and Book of Facts* 84, 85 (1994).

[4] Bill Yenne, *The History of the Burlington Northern* (Brompton Books Corp. 1991). Thus, Burlington Northern became known as a "Land Grant" railroad. *See also* Louis Tuck Renz, *The History of the Northern Pacific Railroad* (Ye Galleon Press 1980).

legal tender for public and private debts." 48 Stat. 112 (1933) (codified at 31 U.S.C. §463) (emphasis added).

In 1934, Congress enacted the Gold Reserve Act, which banned private ownership and the use of gold as legal tender. 31 U.S.C. §§442, 443. Because gold was no longer "legal tender," principal and interest on Gold Bonds were payable only in lawful U.S. currency, i.e., dollars.

2. Burlington Northern Assumed the Gold Bond Obligations

In 1970, Northern Pacific, Great Northern, and two other railroad companies merged into Burlington Northern. *See United States v. Interstate Commerce Comm'n,* 396 U.S. 491 (1970); App. D. Following the mergers, Burlington Northern became the successor obligor under the Gold Bonds.

3. By Legislation Enacted Between 1973 and 1985, Congress Removed the Prohibition Against the Payment of Gold Bond Contracts in Gold

In 1973 and 1974, Congress enacted the Gold Ownership Amendments, which repealed the 40-year prohibition on private ownership of gold. Pub. L. No. 93-110, 87 Stat. 352, tit. I (1973); Pub. L. No. 93-373, 88 Stat. 445 (1974). In 1977, Congress expressly amended the 1933 Resolution by allowing the use of gold clauses from October 27, 1977, forward. Pub. L. No. 95-147, 91 Stat. 1227 (1977) (the "1977 Amendment").[5]

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[5]In support of the enactment of the 1977 Amendment, Senator Jesse Helms stated that the statute "is intended to stand

[footnote continued]

In 1982, the 1933 Resolution and the 1977 Amendment were reworded to read:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

Pub. L. No. 97-258 (1982) (codified at 31 U.S.C. §5118-(d)(2)).

In 1985, Congress authorized the minting of gold coins by the U.S. government. 31 U.S.C. §5112(h) (the "1985 Statute"). As a result, gold coins were issued and became "legal tender" at their face value for the first time since 1933.

Since Congress passed the 1977 Amendment and the 1985 Statute, there have been no legal impediments to payment of the Gold Bonds in gold.

4. The *Rievman* Settlement

Until recently, the Northern Pacific Gold Bonds were secured by Land Grants of railroad property owned by Northern Pacific as of November 1896 and millions of acres of valuable land in the northwest and midwest United States (the "Resource Properties"). *See Rievman v. Burlington N. R.R. Co.*, 618 F. Supp. 592 (S.D.N.Y. 1985) (*"Rievman I"*); *Rievman v. Burlington N. R.R. Co.*, 644 F. Supp. 168 (S.D.N.Y. 1986) (*"Rievman II"*); *Rievman*

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neutral with regard to the enforceability of gold clause obligations issued in the past." 123 Cong. Rec. 633, 635 (1977) (statement of Sen. Jesse Helms). Today, with gold coins again "legal tender," Helms' statement of the statute's "neutrality" further supports the Bondholders' claims: It can be used neither as a sword nor as a shield.

v. Burlington N. R.R. Co., 118 F.R.D. 29 (S.D.N.Y. 1987) ("*Rievman III*").

In 1987, after two unsuccessful attempts, Burlington Northern negotiated a settlement with the *Rievman* bondholders to release the Resource Properties in return for $35.5 million. *Rievman III*, 118 F.R.D. at 31.[6]

Burlington Northern's settlement of *Rievman* and its release of the Resource Properties created a new security resulting from a substituted contract or novation of the Gold Bonds.

5. Burlington Northerns' Corporate Transactions

After October 1977, Burlington Northern engaged in a number of corporate transactions, including mergers, consolidations, divestitures, spinoffs, and offers to purchase and exchange. These transactions resulted in new Gold Bond obligations, by way of Burlington Northerns' ratification of its Gold Bond obligations and substituted contracts or novations, and the resulting creation of new securities.

Burlington Northern admits five corporate transactions it considers relevant. *See* App. F. In four of these transactions, stock of the merged entities that had been pledged as security for the Gold Bonds was released as security.

In addition to the transactions acknowledged by Burlington Northern, the Bondholders have learned of at least six other significant transactions. *See* App. G.

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[6]In 1988, Burlington Northern transferred the Resource Properties to subsidiaries of a separate company, Burlington Resources Inc., which was then spun off as a separate public company. Burlington Northern admits that after the transfer, it incurred a "substantial debt load." At the same time, Burlington Resources Inc. had a market value of more than $5.7 billion.

Burlington Northern's corporate transactions (those acknowledged and those not acknowledged by Burlington Northern) resulted in substituted contracts or novations of the Gold Bonds. The Bondholders believe that there *also* may be other corporate transactions they have not been allowed to discover because of the district court's refusal to grant them Fed. R. Civ. P. 56(f) relief.

IX. REASONS FOR GRANTING THE WRIT

A. Standards for Summary Judgment

The court below viewed this case in the context of the trial court's summary judgment dismissal of the Bondholders' Complaint. A request for summary judgment must be denied when, viewing the evidence in the light most favorable to the nonmoving party, a genuine issue exists regarding any material fact. Even when certain facts are undisputed, if different ultimate inferences might reasonably be drawn about which reasonable persons might differ, the case is not suitable for summary judgment.

Burlington Northern did not meet this heavy burden, and the courts below have denied the Bondholders' request for Fed. R. Civ. P. 56(f) relief.

B. Burlington Northerns' Motion for Summary Judgment Should Have Been Denied Because the 1933 Resolution No Longer Prevents Payment of the Gold Bonds in Gold

1. The Gold Bonds Are Now Payable in Gold

Burlington Northern contends, without support, that the Gold Bonds may be paid in "any" legal tender currency of the United States. The Court of Appeals agreed. *Adams v. Burlington N. R.R. Co.*, 80 F.3d

1377, 1381 (9th Cir. 1996). But both ignore the rejection of this argument over a century ago by *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687 (1872). There the parties had contracted for payments under a promissory note "in specie" (i.e., in gold). The obligor argued that he could lawfully choose between payment in gold or in U.S. notes, which were also "legal tender." The Supreme Court disagreed, holding that, despite the existence of two forms of legal tender, the parties' agreement expressly provided for the method of payment: gold. *Id.* at 695.

Burlington Northern has not tried to avoid the effect of the 1933 Resolution. It candidly admits that after gold clauses became enforceable again, it intentionally and aggressively tried to avoid reviving its gold-clause obligations.

Today the only inhibition on Burlington Northern's making payment in gold is its own unwillinginess to do so. But its unwillingness contradicts *Trebilcock*.

2. The 1933 Abrogation Act and the 1934 Gold Reserve Act No Longer Prevent Payment of the Gold Bonds in Gold

The Bondholders allege that Burlington Northern has breached its contractual obligations under the Gold Bonds. Burlington Northern does not challenge the sufficiency of the Bondholders' allegations. Instead, it argues that the 1933 Resolution provides a "complete defense" to the Bondholders' contract claims as a matter of law. It does not.

As a matter of statutory interpretation and contract law, the 1933 Resolution is no longer an impediment to Burlington Northern's performance.

After enactment of the 1933 Resolution and related legislation, obligors could not legally pay principal and interest in gold because it was no longer legal tender. Duties under the Gold Bonds could be discharged by paying in the *only* currency that was legal tender: U.S. notes not indexed to changes in the price of gold. This is no longer true. U.S. gold coins *are now* also issued as "legal tender," as they have been since 1985 when Congress repealed the impediments of the 1933 Abrogation Act and the 1934 Gold Reserve Act. Once again, the Gold Bonds are payable in gold.

3. Alternatively, the 1933 Resolution Is Unconstitutional

The Bondholders have set forth a basis for enforcing Burlington Northern's gold-clause obligation that is consistent with the viability of the 1933 Resolution, as amended. *See supra* at 8-10.

Alternatively, the Bondholders believe that because the 1985 Statute now makes gold coins "legal tender," continued application of the 1933 Resolution to the Gold Bonds is unconstitutional.[7] Although implied repeal is not favored by the courts, a statute that is irreconcilable with a prior statute effects an implied

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[7] After the ban on private ownership of gold was lifted in 1974, lawsuits to enforce gold clauses were filed on the grounds that these "Gold Ownership Amendments" impliedly repealed the 1933 Resolution. Several courts rejected this theory. *See, e.g., Feldman v. Great N. Ry. Co.*, 428 F. Supp. 979 (S.D.N.Y. 1977). The courts have *not* considered whether the 1985 Statute impliedly repealed the 1933 Resolution. In the most recent state court gold-clause decision, *Schickler v. Santa Fe S. Pac. Corp.*, 593 N.E.2d 961 (Ill. App. 1992), the court considered an implied-repeal argument based on the 1977 Amendment, not on the 1985 Statute. In any event, these authorities do not bind this Court.

repeal. *Morton v. Mancari,* 417 U.S. 535, 550 (1974); *see also Georgia v. Pennsylvania R.R. Co.,* 324 U.S. 439, 456-57 (1945).

The Bondholders do not claim that the 1933 Resolution was unconstitutional when enacted. They claim that it is unconstitutional *now.* The 1933 Resolution was enacted to assure a uniform value of U.S. coins and currency in accordance with Congress' power to regulate money. In 1933 gold had a monetary function in our economy. Today it does not. There is no longer a rational basis on which to apply the 1933 Resolution to the Gold Bonds. This is made manifest by Congress' reinstatement of gold clauses in 1977. As a result of the 1985 Statute, gold coins are now minted as legal tender. Thus, the 1933 Resolution and the 1985 Statute cannot be reconciled.

The enactment of the 1985 Statute also supports a declaration of unconstitutionality of the 1933 Resolution under the "changed circumstances" doctrine recognized in *Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924).

If gold is not legal tender, it is a commodity. If so, the 1933 Resolution applied to the Gold Bonds is arbitrary and capricious and lacks any continued rational basis. The constitutionality of the 1933 Resolution was based on Congress' power to regulate *the monetary system,* i.e., to coin money and regulate its value. *Norman v. Baltimore & Ohio R.R. Co.,* 294 U.S. 240 (1935). By contrast, Congress does *not* have the same sweeping authority to regulate the use and value of a commodity.

> Once the dollar was fully divorced from gold, . . . *gold has become basically equivalent to any other commodity.* Unless it could have been shown that

> gold continued to carry with it important aspects of the mythology that surrounded it as a monetary metal, and, because of this, would greatly interfere with the monetary structure if freely allowed to circulate among persons, there would have been *no constitutional basis* for continuation of the restrictions on private ownership of gold, on private dealings in gold, and on the insertion of gold clauses in contracts.

James Buchanan & Nicholas Tideman, *The Limits of Governmental Monetary Authority, in Gold, Money and the Law* 59-60 (Henry G. Manne & Roger L. Miller eds. 1975) (emphasis added).

Burlington Northern cannot maintain a defense based on an unconstitutional statute.

C. It Is a Material Issue of Fact Whether Burlington Northern Has Issued a New Security by Creating a Substituted Contract or Novation of the Gold Bonds

1. *Rievman* and Burlington Northerns' Other Actions Created a New Security

When the rights of a security holder have been substantially affected by a change in the terms of the outstanding security, that security becomes a new security. *See Abrahamson v. Fleschner,* 568 F.2d 862, 868 (2d Cir. 1977), *cert. denied sub nom. Harry Goodkin & Co. v. Abrahamson,* 436 U.S. 905, *and cert. denied,* 436 U.S. 912 (1978) (the test is whether there is a change in the nature of the investment risk significant enough to create a new investment); *see* Louis Loss & Joel Seligman, *Securities Regulation* 1086 (3d ed. 1989); Bryant Edwards, *Modifying Debt Securities: The Search for the Elusive "New Security",* 47 Bus. Law. 571 (1992).

While *Abrahamson* directly concerned a claim under the Securities Exchange Act of 1940 and the Investment Advisers Act of 1940, the principle it announces is valid here, standing alone or in relation to the Trust Indenture Act of 1939, as amended,[8] which may apply here.

A new security may be created by a substituted contract or novation. A substituted contract is created when the obligee accepts a new contract in satisfaction of the obligor's existing duty; it discharges the original duty and creates a new duty. *Restatement (Second) of Contracts* §279 (1981).

A substituted contract created by a novation of a contract containing a gold clause can revive obligations to pay in gold. *See Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 952-53 (W.D. Wash. 1986) (assignment of lease), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990).

A novation can result from a change in security for an indebtedness.

> When, in the more modern cases, the obligee has taken a new mortgage or security interest, the tendency has been to find that there has been a novation. This has been the case in consumer as well as commercial contexts, and has been so where the new security interest was lesser than the one which already existed.

58 Am. Jur. 2d *Novations* §40 (1989). *See, e.g., In re Tardy*, 18 B.R. 36 (Bankr. C.D. Ill. 1982) (novation resulted from release of security); *In re Averhoff*, 18 B.R. 198 (Bankr. N.D. Iowa 1982) (novation resulted from addition of security).

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[8] 15 U.S.C.A. §77aaa.

The indenture creating the bond security is a contract. *See Katz v. Oaks Indus., Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986). After the contract has been made and resulting bonds are outstanding, it should be virtually impossible to remake the contract without the express consent of all bondholders. This is especially true here: the Gold Bond indentures do not provide for corporate modifications (such as those undertaken by Burlington Northern) if those modifications impair the lien and security of the indenture or any of the Bondholders' rights.[9] Except for *Rievman*, none of Burlington Northern's significant corporate modifications involved the Bondholders' consent. And *Rievman* never even addressed the gold-clause issue that is the subject of these proceedings.

a. The *Rievman* Settlement Created a New Security Through a Change in the Collateral for the Gold Bonds

Burlington Northerns' settlement of the *Rievman* lawsuit created a new security. Burlington Northern replies that the *Rievman* settlement did not result in such a contract because the obligor remained the same.[10]

A new security was created when, in *Rievman*, Burlington Northern significantly changed the Northern Pacific Bondholders' investment risk by substantially reducing the collateral for their Gold Bonds. After *Rievman* they owned something significantly different from what they owned before *Rievman*.

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[9] *See, e.g.*, App. H.

[10] Burlington Northern has also argued that certain language included in the settlement agreement protects it from a novation. Like the obligor in *Fay Corp.*, however, Burlington Northern cannot so easily shield itself from the legal consequences of its actions.

The *Rievman* settlement involved the release of the Resource Properties – over $5 billion worth of collateral for the Gold Bonds. The enormous value of the Resource Properties (and their subsequent "spin-off") represented not just a more than 80 percent reduction in the security for the Gold Bonds (which after *Rievman* was less than $800 million; *see Rievman III,* 118 F.R.D. at 31), but also a fundamental change in the obligor company.[11]

As with the mergers, the Bondholders have sought discovery of documents from Burlington Northern regarding the *Rievman* settlement. Burlington Northern has refused to produce these documents. Nevertheless, even the information that is available – information about the release of billions of dollars worth of security from the Gold Bonds – demonstrates that a new security was created by the *Rievman* settlement.

b. *Fay* and Burlington Northerns' Corporate Modifications Created a New Security

The 1977 Amendment states that gold-clause contracts entered into after October 27, 1977, are enforceable.

The issue is whether Burlington Northern's corporate modifications gave rise to a new security and thus a new obligation to pay the Gold Bonds in gold.

The Bondholders contend that Burlington Northern's various corporate activities and events after October 1977 created new securities of the Gold Bonds. Burlington Northern attempts to limit these modifications to selected events and supplemental indentures of its choosing. *See* App. F. It contends that these events conclusively prove

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[11] In its 1988 Annual Report to its shareholders, Burlington Northern confessed: "We also must manage the substantial debt load remaining after the spin-off of Burlington Resources Inc."

that a substituted contract or novation has not resulted. This argument is wrong.

First, Burlington Northern's subjective interpretation of the effect of these complex modifications cannot be taken at face value, especially when Burlington Northern refused the Bondholders' discovery requests. Because of the unavoidable complexity of such corporate transactions, summary judgment is particularly inappropriate. *Jewel Cos., Inc. v. Pay-Less Drug Stores N.W., Inc.,* 741 F.2d 1555 (9th Cir. 1984). In *Jewel,* the Ninth Circuit reversed the trial court's entry of summary judgment and remanded the case so that "the district court will have the opportunity to examine thoroughly the documents generated during the [merger] negotiations, evaluate the testimony of the parties to those negotiations, and consider evidence relating to customary corporate practice . . . ." *Id.* at 1567. Burlington Northern has too narrowly limited the documents that may be relevant to its complex corporate modifications.

Second, the very existence of supplemental indentures raises serious questions because the Gold Bonds do not provide for modifications if they impair the lien and security of the Gold Bonds. App. H.

Third, Burlington Northern has too narrowly limited the events that might have resulted in a ratification, substituted contracts or novation. For example, the Bondholders have learned of additional mergers, consolidations and corporate events that have not been acknowledged by Burlington Northern and that may have resulted in novations. *See, e.g.,* App. G; see also App. H at 78, 80a concerning ratification by the assumption of payment duties.

Fourth, even the limited events acknowledged by Burlington Northern indicate the creation of a substituted

contract or novation. For example, the "original indentures" treat any consolidation or merger as resulting in a "successor corporation" and "such successor . . . corporation shall assume" all payment and other obligations of the Gold Bonds and "shall succeed to, and be substituted for, the Railway Company." App. H at 78a, 80a. The "supplemental indentures" relating to a "reverse triangular merger" contain language which satisfies the original indentures and provide that Burlington Northern "hereby assumes" all the payment and other obligations of the Gold Bonds "so that . . . Burlington Northern Railroad Company shall succeed to and be substituted for Burlington Northern Inc." *See, e.g.,* App. I. Moreover, the mergers effected a material change to the corporate quintessence of Burlington Northern. The company assumed huge debts and liabilities, e.g., over $195 million of bond debt and other liabilities in the St. Louis-San Francisco merger, *see Burlington N. Inc. - Control & Merger - St. Louis-San Francisco Ry. Co.,* 360 I.C.C. 788 (1980), and over $129 million of bond debt alone in the Colorado and Southern merger.[12]

Burlington Northern argues that its transactions did not result in substituted contracts or novations because

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[12]The essence of Burlington Northern was changed by the cumulative effect of its 1981 "reverse triangular merger," its 1988 transfer of the Resource Properties, and its spin-off of Burlington Resources. For example, when Burlington Northern sought approval for its 1981 "reverse triangular merger," its railway union expressed a "basic fear . . . that the creation of a holding company eventually would lead to the transfer to certain of the railroad's non-transportation assets to holding company subsidiaries, thereby weakening the railroad's financial position." *Brotherhood of Ry. & Airline Clerks v. Burlington N. Inc.,* 513 F. Supp. 1023, 1027 (D. Minn.), *dismissed without opp.,* 664 F.2d 294 (8th Cir. 1981). The transaction was nevertheless approved, and the Bondholders believe that this fear was justified.

the obligor remained the same. This argument ignores the fact that a substituted contract and novation may be created by a *change in the security* of an indebtedness. 58 Am. Jur. 2d *Novations* §40 (1989).

Burlington Northern *admits* that at least four of its post-October 1977 mergers involved *changes to the security* under the Gold Bonds. Specifically, in each of the mergers with the Colorado and Southern Railway Company, the Fort Worth and Denver Railway Company, the Galveston Terminal Railway Company and the Lake Superior Terminal and Transfer Railway Company, the merged entities' stock that had been pledged as security for the Gold Bonds was released. These changes in security create a material issue of fact about whether they resulted in a new security.

Fifth, Burlington Northern argues that at no point after 1977 did it manifest an intent to ratify or assume the obligations to pay the Gold Bond debts in gold. It concludes that because it lacked this intent, a novation was not created. This misperceives the law of substituted contracts or novations.

The existence of a substituted contract or novation and a resulting new security, is an issue of fact. *See Fay Corp.,* 646 F. Supp. at 950.

Sixth, Burlington Northern prevented the Bondholders from conducting discovery about its corporate activities that may have resulted in novations. Mergers and consolidations involved voluminous and complex documents. The Bondholders believe that complete information (not just unilaterally selected portions) regarding

Burlington Northern's mergers, consolidations, and other corporate activities will demonstrate novations.

2. The Bondholders Were Improperly Denied Fed. R. Civ. P. 56(f) Relief

If the grant of Burlington Northern's summary judgment motion is not reversed outright, the motion should be continued as premature. Fed. R. Civ. P. 56(f). When defendants control the relevant information, summary judgment motions are routinely denied or continued:

> If information concerning the facts to be discovered is solely in the possession of the movant, however, "a motion for continuance of a motion for summary judgment for purposes of discovery *should . . . ordinarily be granted almost as a matter of course.*"

Contractors Ass'n v. City of Philadelphia, 945 F.2d 1260, 1263 (3d Cir. 1991) (emphasis added) (quoting *Ward v. United States*, 471 F.2d 667, 670 (3d Cir. 1973)). *See generally* 10A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §2741, at 545 (2d ed. 1983). Moreover, summary judgment is "especially inappropriate where the material sought is also the subject of outstanding discovery requests." *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986).

In January 1994, the Bondholders served discovery requests seeking, among other things, internal documentation about the Gold Bonds; the various mergers, consolidations, and other corporate activities; and the *Rievman* settlement. Burlington Northern refused to produce any of these documents.

At the very least, it was error not to deny as premature or not to continue under Rule 56(f) Burlington North-

ern's summary judgment motion. Because the Bondholders' case "is so heavily dependent upon its ability to probe the facts and circumstances relating" to the actions and intentions of defendants, summary judgment was improper at this early stage of the litigation. *See VISA Int'l*, 784 F.2d at 1475.

X. CONCLUSION

Unless the gold clauses are enforced, the Bondholders' claims will be extinguished for a pittance and Burlington Northern will continue to reap the windfall from which it has benefited since 1933. This unjust transfer of wealth from creditor to debtor should not be allowed to continue when it has been so clearly foreseen and prudently guarded against by contract and when statutory changes, ratification, substituted contracts, or novations have revived sleeping gold-clause obligations.

The courts below were mistaken when they dismissed the Bondholders' Complaint. As a matter of law, the Bondholders have stated valid claims against Burlington Northern for payment of the Gold Bonds in gold. Nothing legally impedes payment of the Bondholders' Gold Bonds in gold. Due to recent statutory changes, contract payment in gold is once against consistent with U.S. public policy.

In addition, issues of material fact and the need for discovery preclude summary judgment. The Bondholders should be allowed to submit to a jury and trier of facts the claims raised in their Complaint.

Therefore, the Bondholders respectfully request that this Court grant the Writ sought by this Petition and ultimately reverse the grant of Burlington Northern's motions to dismiss and for summary judgment.

The Bondholders should be allowed to conduct discovery and to try their case.

DATED July 9, 1996.

Respectfully submitted,

CAMDEN M. HALL
(Counsel of Record)
FOSTER PEPPER & SHEFELMAN
Attorneys for Petitioners.